EUROPEAN POLICY CENTRE

POLICY BRIEF

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Human rights violations in the field of migration: a collective responsibility

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BACKGROUND

Today, the European Union receives the Nobel Peace Prize for its "contribution for over six decades to the advancement of peace and reconciliation, democracy and human rights in Europe". The progress made has been outstanding, but more needs to be done – in particular with respect to the protection of human rights in the field of migration policy.

In this policy area, migrants' human rights – such as the right to family reunification, the right to asylum, prohibition of torture and inhuman or degrading treatment, and protection from detention or removal – are being violated in some EU member states, with appropriate measures to put an end to such violations not always being taken. As a consequence, men, women and children are being deprived of the benefits of human rights in Europe.

Since the entry into force of the Amsterdam Treaty in May 1999, immigration-related policies and rules have been dealt with at EU level. The Europeanisation of these issues cannot be disconnected from the duty to respect human rights insofar as movement of persons within and across member-state borders calls into question the protection of peoples' human rights.

The entry into force of the Lisbon Treaty in December 2009 reinforced the obligation to respect human rights in the field of EU law. Alongside the classic sentence recalling that "the Union is founded on the values of respect for human rights" (Art. 2 TEU), the major change comes from the Charter of Fundamental Rights of the European Union (the Charter), which has become legally binding. Article 51 of the Charter states that the EU institutions and member states "shall (...) respect the rights, observe the principles and promote the application" of the Charter's provisions.

Hence compliance with human rights requirements must be guaranteed by the EU institutions while adopting EU rules, and by member states while implementing EU rules. This means that dealing with human rights issues is no longer the sole responsibility of the Council of Europe, through the European Convention of Human Rights and the Strasbourg Court. It is now more than ever the responsibility of the EU and its member states.

Violations of migrants' human rights, which are reported in some EU countries, are unacceptable under EU law. But the existing mechanisms put in place to prevent abuses of migrants' human rights do not function properly. This triggers legal as well as political concerns. Moreover, it is difficult for the EU to ask its external partners to respect the principles of democracy, rule of law and human rights when it is not able to resolve human rights violations in its own member states.

This Policy Brief outlines the current problems and proposes solutions to overcome the situation.

STATE OF PLAY

Overview of the main legal remedies

When EU or national rules appear to breach human rights, three main legal remedies are provided for by the Treaty.

First, a member state, the European Parliament (EP), the Council or the Commission may ask the European Court of Justice (ECJ) to review the legality of EU rules. Each of these specific complainants may consider, within a period of two months after the adoption of a

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rule, that the rule does not comply with human rights requirements and therefore ask for its annulment.

In practice, this type of action is rare. Before the entry into force of the Lisbon Treaty, this procedure had mainly been used by the EP. As the EP had only consultative powers in this field, it used the procedure primarily to protect its powers. Under the Lisbon Treaty, the co-decision procedure is applicable in the migration and asylum field. Hence, it is difficult to imagine either the Council or the EP triggering such action, as it would appear illogical for the legislator to 'attack' a rule that it has just adopted. With respect to the Commission, it could always withdraw its proposal where it considers that negotiations within the legislative process, between the Council and the EP, betray the initial proposal. Hence, the only possibility remaining would be action taken by a member state opposed to the adoption of the rule but unable to prevent its adoption due to the qualified majority voting rule now applicable in the Council.

The second legal remedy is an infringement procedure, which may be triggered by the Commission or a member state when another EU country "has failed to fulfil an obligation under the Treaty". This could happen where a country breaches human rights when implementing EU rules.

In practice, infringement procedures are almost exclusively launched by the European Commission for two reasons. The Commission is 'the guardian of the treaties'. In this context, it is empowered to inquire and, when necessary, ask member states, or at the final stage the ECJ, to end any violation of the treaty or the provisions of EU law, including human rights. Secondly, member states generally refrain from 'attacking' each other. In the whole of EU history, only six infringement procedures have been initiated by one country against another. Normally, member states prefer to leave the 'hard work' to the Commission in this regard.

The third route is the preliminary ruling procedure. Individuals may ask their national judge, during a trial, to ask the ECJ to give its interpretation of EU rules in order to assess whether national rules and/or practices are compatible with EU rules and human rights. This procedure depends on the judge's willingness to trigger such a step. However, it has proven on many occasions to be successful in safeguarding individuals' rights.

Violations of human rights: member states responsibility only?

Unfortunately, and as demonstrated below, some member states violate human rights when dealing with issues related to asylum and migration.

While member states primarily bear the responsibility for such violations, the European Commission does not act to prevent human rights abuses. Indeed, and with the exception of a small body of case law, the European Commission has proven to be very reluctant to take action against member states on the basis of infringement procedures with respect to asylum and migration issues. As a consequence, EU countries are violating or have violated human rights without the Commission taking action against them. Some examples of the Commission's failure to act are telling.

In the field of asylum, one of the most obvious cases is the so-called 'MSS' case law where the European Court of Human Rights, a Court outside the EU's legal system, condemned Greece and Belgium for violating Article 3 of the European Convention of Human Rights (prohibition of inhuman and degrading treatments). Due to systemic deficiencies in its asylum procedure and the appalling situation in which asylum seekers are left, the Court considered that Greece had breached human rights. Belgium was consequently condemned for sending back asylum seekers to Greece. In both situations, violations of human rights derived from poor or non-implementation of EU rules. Alongside member states' condemnation, this case law reflects that the Commission did not fulfil its obligation to take action against these countries to put a stop to violations of EU rules and human rights.

The Commission's inaction is also obvious in the field of family reunification, in particular regarding the compatibility of Dutch rules with the right to family reunification. Under Dutch law, applicants for family reunification have to take a civic integration examination in the country of origin. The examination comprises a language and a civic test. If the examination is successful, applicants are able to join the sponsor in the Netherlands. If not, the visa required for entering the Netherlands is not issued and applicants have to take the examination again until they succeed. In 2008, the Commission questioned the conformity of this rule with the EU directive on the right to family reunification without initiating any specific procedure.

Later, an Afghan woman – Ms. Imran – was refused reunification with her husband and eight children residing in the Netherlands because she had failed the examination. Action was taken by Ms. Imran against the decision to refuse family reunification. The Dutch judge tabled a preliminary ruling before the ECJ asking whether the civic integration examination abroad was compatible with EU law. The Commission's legal service issued written observations in the case law stating that the Dutch law was breaching the right to family reunification. Unfortunately, the ECJ did not give a ruling in the case law because the Dutch authorities had in the meantime granted a residence permit to Ms. Imran. But the Dutch legislation remained unchanged, which could lead to further violations.

The problem here is clear: the European Commission, and its legal service, stated that Dutch law breached the right to family reunification, but it never launched

an infringement procedure against the Netherlands. In other words, the Netherlands is freely violating the right to family reunification.

There are several further examples of member states failing to properly implement EU rules and not respecting rights protected by the Charter. Due to the Commission's inaction, the only chance that individuals have to protect their human rights is to convince national jurisdictions to table preliminary rulings before the ECJ. This procedure has proven to be fruitful in several case laws related *inter alia* to family reunification, detention conditions or asylum procedures.

Reasons for the European Commission's inaction

Without condoning the European Commission's lack of action, and keeping in mind member states' chief responsibility, three main reasons may explain why it is so difficult for the Commission to launch infringement procedures against member states in breach of EU rules and human rights in the field of asylum and immigration.

The first one is structural. With regard to the high sensitivity of migration-related issues, which are often considered by member states as part of their sovereign power, the Commission is stuck between a rock and a hard place. Indeed, when it decides to launch an infringement procedure against an EU country, the Commission is at the same time negotiating legislative proposals with the Council. Put differently, the Commission has to take one State to Court and ask the same country to agree on a proposal. The position is more than tricky and the decision to favour the adoption of legislative acts, in order to achieve policy goals, may be considered ahead of launching infringement procedures.

The second reason is linked with the internal functioning of the Commission's Directorate General (DG) Home Affairs, devoted to asylum and migration issues. This DG is not "litigation driven" as is the case for instance with respect to other DG's such as Internal Market, Competition or Environment. On the contrary, DG Home is more of a "legislative" DG where the strategy is oriented towards the adoption of legislations. The litigation side is not particularly developed partly due, as aforementioned, to the high sensitivity of the issues.

Finally, it should be recalled that a decision to launch infringement procedures is not taken by an individual commissioner but by the complete College of Commissioners. This means that the commissioner in charge of the dossier must be able to convince the other commissioners of the importance of taking action against a member state.

At the end of the day, human rights and the rights of migrants are being violated by some member states and neither the EU institutions nor other EU countries are able or willing to stop this situation. At a time where compliance with human rights is essential – because of the legally binding Charter of Fundamental Rights, because of the perspective adherence to the European Convention of Human Rights, because the EU is asking its own neighbours to do so, because such violations could be condemned by 'external bodies' such as the Strasbourg Court or the UN Human Rights Committee – solutions must urgently be proposed and implemented.

PROSPECTS

There are three main ways in which the deadlock could be broken to ensure that migrants' human rights are fully respected.

The 'adaptation' way

This concerns first of all the European Commission, which must take into account the seriousness of the issue and take action against member states that are breaching human rights rules. This is desirable since the Commission states regularly, in reports and hearings, that it will launch the necessary procedural steps in the event of non-compliance, but does not in fact do so.

Another 'adaptation' is more technical and falls within the competence of the ECJ. As it has consistently ruled, the Court dismisses actions for failure to act tabled against the Commission. More precisely, the Commission has the discretionary power to decide whether or not to launch an infringement procedure. The Court does not accept action aimed at condemning the Commission for not exercising its powers. One solution could be to consider that the ECJ must revise its position because the issues that are at stake are related to human rights. This reversal of jurisprudence would be limited to situations where the provisions of the Charter are being violated.

The political way

There are different ways to put political pressure on member states and the Commission regarding human rights violations. A significant one is political pressure from the EP.

The European Parliament has successfully pushed for human rights protection while carrying out its legislative duties. It was for instance able to maintain the development of a 'Fundamental Rights Strategy', which is to be implemented by the Frontex agency. The strategy implies putting in place an effective mechanism to monitor respect of fundamental rights in all the activities of the Agency, including the appointment of a Fundamental Rights Officer.

But the EP's influence over member states regarding the implementation of EU rules and subsequent breaches of human rights may prove more difficult to exercise. The Parliament should then shift political pressure to the Commission. Indeed, the EP has a strong influence over the Commission, particularly since the dismissal of the Santer Commission. It should be willing to take a closer look at human rights violations in EU member states, voice its concerns and find ways to stop violations, for instance by pressing the Commission to launch infringement procedures. For the moment, neither the EP nor specific standing committees (such as Civil Liberties, Justice and Home Affairs [LIBE]; Human Rights [DROI]; or Legal Affairs [JURI]) have formally asked the Commission to act.

This political pressure could be amplified by EU agencies such as the Fundamental Rights Agency, UN Agencies such as the UN High Commissioner for Refugees, the Council of Europe Commissioner for Human Rights as well as civil society organisations and NGOs. They can provide the EP with evidence of violations occurring in the member states, according to their specific field of competence and analysis. It is worth remembering that reports published by Agencies and NGOs are regularly taken into account by the European Court of Human Rights in its case laws. In this view, field work, evidence and analysis could constitute solid elements for the deliberation of the EP and further action.

The Treaty modification way

This route is by far the most difficult. Indeed, any Treaty change is a difficult and uncertain exercise. However, the issue is serious enough to start thinking about alternatives when human rights violations are at stake. To put it differently, if the aforementioned proposals are not put into motion to stop human rights abuses, alternatives should be found. One would be to attribute to an independent authority the power to launch infringement procedures against failing countries. While the establishment of such a new mechanism would trigger extremely complex legal issues, the following elements could constitute cornerstones and feed the debate.

The possibility to assign to an independent authority such a power should be limited to human rights and migration-related issues. The Charter acts as an incentive to take action and as a framework, i.e. the power exercised by the authority should be limited to assessing the respect of the Charter.

The procedure should be based on the principle of subsidiarity, i.e. the independent authority is entitled to launch an infringement procedure insofar as the European Commission has not acted. As a consequence, the authority should a) have the necessary means to assess violations in the member states; b) communicate with the responsible Commission DG on violations; c) recommend that the European Commission take action, and; d) where the Commission fails to launch a procedure, and after a defined period of time, be able to go to the ECJ.

The issue of the authority to which this new power should be awarded remains open. Different solutions are possible. The EP may be invited to create a specific committee in charge of these issues. An already existing EU body or Agency, such as the Ombudsman or the Fundamental Rights Agency, could be empowered. Alternatively, this new function could be attributed to a newly created independent authority.

Where it becomes apparent that the EU did not put in place appropriate measures to stop human rights violations, then appointing an independent authority would come as a final bulwark before the adoption of 'shameful' sanctions against a failing country as provided for by Article 7 TEU.

Violation of migrants' human rights is a cause of common concern. While member states must accept their responsibility not to breach these fundamental rules, the EU institutions and in particular the Commission should also exercise their duty to protect human rights within the framework of EU law. At present the ECJ is the only one willing to do its duty when called upon in this regard.

This is not just a legal issue but also a political one, which calls for reflection on the degree to which institutions are able to exercise their powers and therefore be granted further ones. This is also a crucial issue in terms of the EU's relationships with and obligations to third countries, in particular with respect to the principles of democracy, human rights and the rule of law. The EU and its member states will not be able to request a high level of commitment in those fields if they are unable to properly deliver themselves.

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These issues are discussed in the EPC's Europe Migration and Diversity programme.

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